

DEPARTMENT OF STATE REVENUE**LETTER OF FINDINGS NUMBER: 95-0233RST
Sales and Use Tax
For Years 1992 and 1993**

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ISSUES**I. Sales Tax – Imposition**

Authority: Ind. Code § 6-2.5-2-1;
Ind. Code § 6-2.5-6-7;
Ind. Code § 6-8.1-5-1.

The taxpayer protests the assessment of sales tax liability.

II. Use Tax – Imposition

Authority: Ind. Code § 6-2.5-3-2;
Ind. Admin. Code tit. 45, r. 2.2-4-34;
Ind. Admin. Code tit. 45, r. 2.2-5-12;
Ind. Admin. Code tit. 45, r. 2.2-5-14;
Ind. Admin. Code tit. 45, r. 2.2-5-15.

The taxpayer protests the assessment of use tax liability.

III. Tax Administration – Penalty

Authority: Ind. Code § 6-8.1-10-2.1.

The taxpayer protests the assessment of a ten percent (10%) negligence penalty.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation that assembles and sells hospital admission kits. The taxpayer also makes other retail sales including various types of medical supplies

and equipment. Additionally, the taxpayer manufactures and sells an EKG cable cleaning solution. The taxpayer properly collected sales tax on its taxable sales but failed to remit the full amount of sales tax collected to the Department of Revenue. A sales and use tax audit was completed on February 24, 1995.

I. Sales Tax – Imposition

DISCUSSION

The taxpayer was assessed sales tax on taxable sales made during the audit period. The taxpayer, in its protest letter dated April 7, 1995, states that:

Sales tax was paid [to the Department] at time of invoicing until 1993. At that time we were forced to switch to time of collection. In many cases tax was paid [to the Department] and never collected [from the taxpayer's customers]. This Audit was conducted on invoices not collections. That information [financial records such as deposit slips and check registers] was available [to the auditor] but they chose not to use it.

A sales tax is imposed on retail transactions made in Indiana and the retail merchant has the responsibility to collect the tax as an agent for the state. Ind. Code § 6-2.5-2-1.

Except as otherwise provided in IC 6-2.5-7 or in this chapter, a retail merchant shall pay to the department, for a particular reporting period, an amount equal to the product of:

- (1) five percent (5%); multiplied by
- (2) the retail merchant's total gross retail income from taxable transactions made during the reporting period.

The amount determined under this section is the retail merchant's state gross retail and use tax liability regardless of the amount of tax he actually collects.

Ind. Code § 6-2.5-6-7.

Therefore, the state gross retail tax (sales tax) is based on the taxpayer's gross retail income, regardless of what method the taxpayer employs to collect it. The taxpayer, as a retail merchant making a retail transaction in Indiana, had a duty to collect sales tax on its taxable sales and remit the tax to the Department. The auditor determined that the taxpayer made taxable sales in Indiana but failed to remit the full amount of sales tax due to the Department of Revenue. "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Ind. Code § 6-8.1-5-1(b).

The taxpayer has submitted no evidence indicating that the sales tax assessment was wrong. Therefore, the taxpayer is liable for the full amount of the sales tax assessed as a result of the audit report.

FINDING

The taxpayer's protest is denied.

II. Use Tax – Imposition

DISCUSSION

The taxpayer was assessed use tax on items purchased by the taxpayer. The taxpayer protests the imposition of use tax on items it purchased at an auction, its purchase of mailing labels, and its purchase of a Polaroid slide maker. According to the taxpayer, some of the items it purchased at the auction were later resold. Other items, such as the slide maker, were intended to be resold but were not. The taxpayer argues that some of its purchases were items that were used in manufacturing and therefore exempt from tax.

“An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.” Ind. Code § 6-2.5-3-2(a).

Regarding the purchases of items at auction, the Indiana Administrative Code states:

In general, all sales of tangible personal property by any person engaged in the business of making sales at auction are taxable. This regulation excludes only occasional or isolated sales of tangible personal property on the premises of the owner in those instances where such tangible personal property was not acquired for resale.

Ind. Admin. Code tit. 45, r. 2.2-4-34.

As indicated in the audit report, the auction purchases by the taxpayer were from a professional auctioneer engaged in the business of selling items at auction. Sales tax was not paid by the taxpayer at the time the auction purchases were made and the taxpayer's purchases do not qualify as occasional or isolated sales, thus use tax was properly assessed.

The taxpayer argues that its purchase of mailing labels should be exempt from use tax as a component used in manufacturing. The mailing labels were used when mailing out hospital admission kits assembled by the taxpayer. The taxpayer cites no statutes or regulations in support of its position. Mailing labels do not qualify for exemption as

material incorporated into tangible personal property produced for resale because they do not form a material or integral part of the finished product. Ind. Admin. Code tit. 45, r. 2.2-5-14(a). Nor do mailing labels qualify as personal property directly consumed in manufacturing, processing, refining, or mining because they do not have an immediate effect on any articles being produced. Ind. Admin. Code tit. 45, r. 2.2-5-12(c). Mailing labels are used in the post-production activity of shipping and are thus subject to use tax. Ind. Admin. Code tit. 45, r. 2.2-5-12(f).

The Polaroid slide maker was, according to the taxpayer's protest letter, purchased for resale. The taxpayer indicates that this property was not actually resold. To qualify for the resale exemption, three conditions must be met:

- (1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;
- (2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and
- (3) The property is resold, rented or leased in the same form in which it was purchased.

Ind. Admin. Code tit. 45, r. 2.2-5-15(b).

The slide maker was not actually resold, therefore the use tax exemption does not apply.

The taxpayer has provided no evidence that other items it purchased, and assessed use tax in the audit, were actually resold or used for an exempt purpose. Absent such evidence, use tax was properly assessed by the auditor.

FINDING

The taxpayer's protest is denied.

III. Tax Administration – Penalty

DISCUSSION

The taxpayer was assessed a ten percent (10%) negligence penalty for its failure to remit sales and use taxes. In Indiana, if a person:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence; or
- (4) fails to timely remit any tax held in trust for the state;

that person is subject to a ten percent (10%) penalty.

Ind. Code § 6-8.1-10-2.1(a).

A taxpayer may avoid a penalty by making an affirmative showing in a verified written statement that there was reasonable cause for failure to pay the tax. Ind. Code § 6-8.1-10-2.1(e). The taxpayer has not provided the Department with reasonable cause for its failure to pay the tax deficiencies. The penalty in this case is proper.

FINDING

The taxpayer's protest is denied.